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TO CHAIRMAN HOWARD COBLE
AND THE MEMBERS OF THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Legislative Hearing on H.R. 3060, the "Terrorist Death Penalty Enhancement Act of 2005," H.R 3035, the "Streamlined Procedures Act," and H.R. 1751, the "Secure Access to Justice and Court Protection Act of 2005."

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Judiciary Subcommittee on Crime, Terrorism, and Homeland Security
2141 Rayburn House Office Building
Washington, D.C.

Statement of Bernard E. Harcourt

I would like to focus my remarks today on H.R. 3035, the "Streamlined Procedures Act of 2005," for the very simple reason that this proposed bill is radical. It seeks a radical cutting and slashing of our existing process of federal habeas corpus review of state convictions under the Anti-Terrorism and Effective Death Penalty Act reform package that Congress carefully crafted in 1996 (the "AEDPA"). This new bill would effectively gut federal habeas corpus review where states have imposed a sentence of death—in other words, in the most important habeas cases—as well as in non-capital cases. To give a simple idea of how extremely radical this proposed legislation really is, let me just point to three provisions:

(1) Section 9, titled "Capital Cases," effectively strips all federal courts of jurisdiction to consider most claims in state death penalty cases if the United States Attorney General certifies that the state from which the conviction emanated provides competent counsel to indigent capital defendants in state post-conviction proceedings. In other words, in those states in which the Attorney General certifies that counsel is provided in state post-conviction, there will likely be *no more federal habeas corpus review in death penalty cases.* Under this legislation, the federal courts will no longer have jurisdiction to ensure reliable convictions of capital murder and sentences of death. The one narrow and limited exception for claims of actual innocence comes with conditions that scarcely anyone would be able to satisfy. This is radical surgery. It would virtually abolish federal habeas corpus review for state prisoners in death penalty cases.

(2) Section 4, titled "Procedurally Defaulted Claims," eviscerates the carefully crafted standard of "cause and prejudice" that Chief Justice William Rehnquist thoughtfully and deliberately articulated in *Wainwright v. Sykes* in 1977. The Chief Justice's standard for procedurally defaulted claims represented a careful though substantial narrowing of the earlier standard of "deliberate bypass" articulated in *Fay v. Noia* in 1963. The standard for procedural default has achieved a well-recognized and well-understood level of equilibrium in the federal courts, so much so, in fact, that Congress effectively retained Chief Justice Rehnquist's standard when it adopted the AEDPA by being silent on the matter. It was well understood by all responsible reformers that the standard worked well and was being applied properly by federal courts. This proposed legislation effectively slashes this entire body of law. Again, this is radical surgery that is being proposed.

(3) Section 6, titled "Harmless Error in Sentencing," effectively eliminates federal review of any sentencing claim that a state court has found to be harmless or non-prejudicial. Again, this Section covers a large portion of sentencing claims raised in federal habeas corpus, since in reality there would be no federal habeas petition if the sentencing claims had not been found to be harmless or non-prejudicial. This section would primarily affect death penalty cases where the question typically is whether counsel rendered the effective assistance of counsel at the death sentencing phase—a two prong standard that is generally resolved on the basis of the prejudice prong with a finding of no prejudice. In effect, in a single stroke, Section 6 wipes out federal court jurisdiction to review most capital sentencing issues. This section also applies to non-capital cases.

Again, not to put too fine a point on this extremely blunt proposed legislation: This is radical surgery that is being proposed, the functional equivalent of amputating four limbs to improve the blood flow of a healthy and functioning human being. I say "healthy and functioning" because federal habeas corpus under the revised and streamlined provisions of the AEDPA are only now, finally, after a decade of federal litigation, beginning to be ironed out by the United States Supreme Court and beginning to be understood by federal District and Circuit Courts. It has, literally, taken almost ten years for the AEDPA to become functional, well-understood, and applied. This proposed legislation would not only deprive federal courts of jurisdiction to review highly meritorious claims, but would also spawn a new round of constitutional and statutory litigation that would preoccupy the federal courts for the next decade—or at least until the next wave of habeas reform.

H.R. 3035 proposes radical changes to our existing system of federal habeas corpus review under the AEDPA that would, in all likelihood, result in the execution of citizens who have been wrongly convicted and sentenced to death. This proposed legislation would virtually eliminate the ability of federal courts to determine federal issues in cases in which a state prisoner—whether facing a death sentence or serving a prison term—seeks relief by means of habeas corpus. It would overrule numerous Supreme Court cases, many of which are based on constitutional principles of federalism, separation of powers, and comity. And in the process, rather than streamlining habeas corpus, this legislation would complicate the litigation of all criminal cases, especially death penalty cases, invite massive constitutional challenges on the theory that the legislation impairs the independence of the federal courts, and delay resolution of these

cases at the expense of victims and their families. The real effect of this legislation would be to bog down the federal courts with new challenges to these streamlined procedures.

To be sure, the legislation does include an exception for claims of actual innocence. However, that escape valve is far too narrow, far too limited, and far too constrained to prevent innocent persons from being executed or sent to prison. A petitioner who claims actual innocence must demonstrate that: (1) his factual predicate "could not have been previously discovered through the exercise of due diligence;" (2) the underlying facts "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty;" *and* (3) a denial of relief on the basis of the claim would be "contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." Clearly, a genuinely innocent death row inmate could be foreclosed from raising actual innocence for a variety of reasons: The new evidence could possibly have been discovered earlier, or the evidence might not clearly and convincingly persuade every reasonable judge or jury, or it might not be unreasonable to reject the constitutional claim itself apart from any evidence of actual innocence.

The evidence necessary to demonstrate actual innocence is never born full-grown. In practically all cases of exoneration, the evidence develops gradually, in bits and pieces, over time. The evidence may start to develop by means of a claimed *Brady* violation (i.e. failure to disclose exculpatory evidence), a *Giglio* violation (i.e. failure to disclose a deal with a state witness), or the recantation of a crucial state witness. Most often, those first

pieces of evidence are not one-hundred percent persuasive. Standing alone, by themselves, they are not necessarily convincing to all reasonable fact finders. But they become completely convincing over time, as the *Brady* or *Giglio* claims start unearthing more evidence of innocence, as they mature into full-blown misconduct, admissions of falsification, or discovery of new exculpating evidence. To require petitioners to prove their innocence without allowing them to litigate the underlying constitutional violations that have effectively masked their innocence is to blink reality: It is to ignore the tragic lessons that we learned about exoneration over the last two decades. It is to ignore the terrible history of exonerations of death row inmates in my home state, Illinois—where 13 death row inmates were exonerated during a period when 12 death row inmates were executed.

Well-established practice in criminal litigation confirms that proving innocence is an incremental, step-by-step process. I personally learned this the hard way in a case involving an innocent death row inmate in Alabama named Walter McMillian. Along with Bryan Stevenson, the director of the Equal Justice Initiative, we were able to ultimately prove Mr. McMillian's innocence and escort him off Alabama's death row on March 2, 1993. But we were only able to prove his innocence step by step, in increments, in bits and pieces. Like most death penalty cases, this was not a DNA exoneration. We were able to piece together overwhelming proof of innocence, starting with a recantation of the lead witness, which was then verified by multiple *Brady* violations regarding the failure to disclose the state witness's numerous pre-trial statements to doctors and law enforcement officials adamantly asserting that he was being coerced to frame an innocent man; by numerous *Giglio* violations regarding the

state's failure to disclose that another state witness had been well remunerated and released from detention for his false testimony; as well as significant other evidence of innocence. The fact is, none of this evidence could have been developed and presented in federal court as one package if this legislation had been in effect—in other words, if the other constitutional violations had not been allowed to proceed. Under this proposed legislation, precluding the underlying constitutional claims will undoubtedly eviscerate genuine claims of innocence.

By closing the door to the underlying federal claims that support evidence of actual innocence, this legislation effectively closes the door of habeas corpus to actually innocent prisoners and death row inmates. And as we have seen over the course of the past decade, tragically there are innocent inmates on America's Death Row.

In what follows, I will first review the more important provisions of H.R. 3035 and discuss the implications of this radical legislative proposal. I will then consider the "actual innocence" safety valve—which is not adequately protective. I will then conclude.

I. The Sections of H.R. 3035

Section 1: Short Title

This section simply states the short title of the bill—namely, the "Streamlined Procedures Act of 2005"—but the title itself is important because it is, importantly, misleading. The short title suggests that these amendments to the AEDPA will improve the efficiency of federal habeas corpus. Nothing could be further from the truth. The fact is, this legislation will spawn a new round of constitutional litigation about federal habeas corpus that will consume the federal courts and the United States Supreme Court for a

decade—or until the next round of habeas reforms, whichever comes first. This proposed legislation would actually frustrate the streamlining efforts that have been under way for nearly a decade as a result of Congress enacting a comprehensive reform program with the AEDPA in 1996. Since that time, federal courts—and especially the United States Supreme Court—have spent an inordinate amount of time, energy, and deliberation trying to iron out the confusing language in the AEDPA in an effort to make the federal habeas system operate effectively. This bill would simply churn existing Supreme Court jurisprudence and produce new litigation requiring yet more time and effort to interpret. Many of the sections of this legislation would raise significant constitutional questions about the power of Congress to restrict federal court review of habeas claims, including whether or not the bill violates the Suspension Clause of the United States Constitution. Pending death penalty and non-capital cases would be held up while the courts resolve questions about the meaning of the new law.

The fact is, several sections in this legislation—especially Sections 6 and 9, discussed below—would raise constitutional challenges on the theory that they invade the independence of the federal courts under Article III. Courts with the responsibility of decision necessarily must be entitled to address issues crucial to an appropriate judgment. Congress cannot ask them to adjudicate cases and, in the same breath, tell them what results to reach. The enactment of these provisions would invite more lawsuits challenging not only the new provisions in this bill, but also the AEDPA.

The constitutional difficulty with this proposed legislation is straightforward: The bill contemplates that federal courts would take jurisdiction of cases in order to decide whether previous state court judgments are valid, but then it would deny those courts

jurisdiction to decide questions of federal law that are crucial to reaching proper results. This would deprive federal courts of their Article III authority to decide cases within their jurisdiction according to the Constitution, as well as principles of separation of powers, and it would arguably suspend the writ of habeas corpus without a justifying national emergency. These are significant constitutional claims that will preoccupy federal courts at all levels of federal habeas corpus review.

Section 2: Mixed Petitions

This second section deals with what are called "mixed petitions"—namely federal petitions that raise both claims that have been exhausted in state post-conviction proceedings and claims that have not been exhausted. Under this new provision, federal courts would be *required* to dismiss *with prejudice* unexhausted claims regardless of the merits of the claim. The section effectively withdraws all judicious discretion from the federal courts. The section also requires state prisoners—most of whom have no lawyers in state post-conviction—to press each of their federal claims in state court with special care, articulating the specific federal basis for each claim, and to explain in their federal petitions how they have complied with that mandate.

The only exceptions would be for prisoners whose claims rest on "new rules" of law that have retroactive effect or on newly discovered evidence clearly demonstrating that the prisoner did not commit the crime of which he was convicted. Even then, no exception would be allowed unless a claim is so plainly meritorious that it would be unreasonable to reject it—the actual innocence exception discussed later. It is important to note here that, since 1989, when the Supreme Court announced its current doctrine regarding "new rules," the Supreme Court has never given a new procedural rule

retrospective effect. Only novel rules of substantive law, such as the prohibition on executing mentally retarded prisoners, apply to older cases. Accordingly, the only procedural claims that would fall into the exception this section allows would be claims going to factual innocence—irrespective of whether a prisoner's federal constitutional rights were violated.

What this provision does is effectively handcuff federal courts from exercising the kind of judicious discretion that is necessary to avoid miscarriages of justice in criminal cases. The federal courts use this discretion sparingly, but it is crucial to the system and to the legitimacy of criminal justice review in this country. This section would effectively overturn the Supreme Court's careful decision this Term in *Rhines v. Weber* (2005), allowing a federal district court to hold a habeas petition on its docket while a prisoner takes his claims to state court. This section would transform the exhaustion doctrine from a device that keeps federal courts from adjudicating claims before the state courts have had a chance to correct their own errors into an absolute prohibition on federal court consideration of federal claims.

Section 3: Amendments to Petitions

This third section would limit a petitioners ability to amend his federal habeas corpus petitions to only once and then only if he acts before the state files its answer. It would not allow prisoners to add new claims, unless they meet the extremely tight standards for filing second or successive habeas petitions. A provision in the AEDPA established a similar restriction in death penalty cases, but only in states that provide indigent death row inmates with competent lawyers in state post-conviction. This section would impose essentially the same limitation on amendments *across the board*—for non-

capital as well as capital cases—regardless of whether the state provides counsel in state court. This too is a significant limitation to the administration of justice, especially for petitioners who may be indigent and without counsel.

Section 4: Procedurally Defaulted Claims

This fourth section is one of the most radical provisions in the proposed legislation. It would effectively strip federal courts of jurisdiction to review claims that were procedurally defaulted in state court. The federal courts would have no choice but to accept at face value a state court's decision that some state procedural rule established a procedural requirement, that the prisoner or his attorney failed to comply with that requirement, and that, in consequence, the state court declined to consider the prisoner's federal claim. In explicit language, this section also eliminates federal court jurisdiction to consider whether the petitioner's alleged procedural default in state court was attributable to his lawyer's ineffective assistance of counsel. The only exceptions, again, would be for petitioners whose claims rest on "new rules" of law that have retroactive effect or on newly discovered evidence showing that the prisoner is innocent. Under this section, accordingly, federal constitutional claims would be barred from *both* state and federal court, irrespective of their merit.

Incidentally, this section is written in an extraordinarily overbroad manner, such that it even precludes a federal court form considering a claim that *was addressed on the merits* by the state court if that court also mentioned that the petition may have committed a procedural default by failing to raise the claim properly in state court. In addition, it would deprive a federal court of jurisdiction to examine a claim that a state court was willing to review for plain error—unless the claim rests on a "new rule" of law

that has retroactive effect or on newly discovered facts showing that the prisoner shouldn't have been convicted.

Congress has always left the problems associated with procedural mistakes in state court to the United States Supreme Court, which has handled those problems under the well-developed "cause and prejudice" standard established in a long line of decisions following Chief Justice Rehnquist's opinion for the Court in *Wainwright v. Sykes* (1977). This proposed change—again, a form of radical surgery—would overrule well established precedent and a large body of Supreme Court case law, and in the process trigger a whole new statutory rules that would have to be interpreted in yet another potentially large body of judicial decisions. The proposed bill opens a veritable can of worms.

Section 5: Tolling of Limitation Period

This fifth section would overrule yet another careful and recent United States Supreme Court decision, specifically *Carey v. Saffold*. In the process, the section would create a havoc of computational complexities that would bog the courts down in all kinds of litigation over filing dates, mandate dates, issuance dates, and so forth.

Under the AEDPA as it now stands, the one-year period for filing a federal petition is suspended while a "properly filed" application for state relief is "pending." If a prisoner is unsuccessful before the lowest level state court, he usually can either seek appellate review of that court's decision or start afresh with an independent application in a higher state court. Either way, there is a gap between the date he formally leaves one court and the date he begins in the next. In *Saffold*, the Court held that so long as a prisoner proceeds according to state law (meeting all the filing deadlines the state itself

may establish), the federal filing period is suspended from the date the prisoner first goes to a state court until the highest state court acts.

This section, by contrast, would require a federal court to examine the state court records, compute any period of time (however brief) when a prisoner was not formally before some state court, and charge that time against the one-year federal filing period.

In addition, this section would also mandate that if an application for relief in state court is to suspend the filing period for a federal habeas corpus petition, it must contain alleged violations of the prisoner's federal rights. Under existing AEDPA law, a petition tolls the time for filing a federal habeas if it contains only claims based on state law. This makes entire sense: if the state courts find a state-law claim meritorious and grant relief on that basis, there will be no need for federal courts to become involved at all. This section would frustrate that means of reducing the number of federal habeas petitions.

Finally, this section would forbid federal courts to relax the one-year filing period on equitable grounds—when there are extremely good reasons why a prisoner was unable to get to federal court within one year. All federal courts now allow for that possibility, though they rarely actually give prisoners more time. This section would eliminate that authority. Here again, the proposed legislation does violence to the important interest that federal courts have in equitable discretion, administered responsibly.

Section 6: Harmless Error in Sentencing

This section would strip federal courts of jurisdiction to entertain most claims regarding a sentence if a state court found any constitutional error that occurred to be "harmless" or "not prejudicial." The only exceptions would be for prisoners who

demonstrate that the violations they suffered were "structural." (By definition, structural claims cannot *be* "harmless." And in any event, very, very few errors are "structural" in the necessary sense, so the exception for structural error cases is inconsequential).

Sentencing claims are by no means frivolous, nor do they simply clog up the federal dockets. In death penalty cases, they often raise the most important issues to be resolved. And in sentencing guideline cases, as demonstrated recently in the Supreme Court's decisions in *Apprendi v. New Jersey* and *Booker v. United States*, they often raise crucial issues of constitutional dimension. This section would carve out an enormous share of the federal courts' jurisdiction to adjudicate important sentencing issues, especially in capital cases. Nothing in this section would allow a federal court to examine whether a state court correctly determined that a trial error was "not prejudicial." So the federal court would be expected to resolve a constitutional case without the authority to determine independently the crucial federal issue. This would invite constitutional challenges for invading federal court independence.

Section 7: Unified Review Standard

This seventh section would make the provisions in AEDPA applicable to cases that were already pending on the date that Act became law. Thus it would overturn still another careful Supreme Court decision, *Lindh v. Murphy*, which construed AEDPA not to extend some of its key provisions to pending cases. The decision in *Lindh* not only respected Congress' wishes, but also eased the transition from prior law to the new AEDPA regime. Extending AEDPA to those cases would invite arguments about whether Congress genuinely means to impose new legal consequences on events in the

past and, if so, whether changing the rules of the game retroactively is constitutional. Both arguments would, of course, trigger yet more litigation.

Section 8: Appeals

This section would establish new timetables for federal courts to follow in processing appeals in habeas cases. AEDPA contains similar timetables—but only for death penalty cases and then only for cases arising from states that give something in return, namely counsel for indigents in state post-conviction proceedings.

This long, intricate, and confusing section does not address a genuine problem. There is no good evidence that federal appellate courts fail to handle habeas appeals expeditiously. The most likely consequence of this section is that the federal courts would have to lay aside ordinary civil and criminal cases in order to rush habeas corpus cases to judgment, which may compromise the quality of the courts' work—raising yet another basis for a constitutional challenge.

Section 9: Capital Cases

This section, again, is perhaps the most radical one in the proposed bill. It would strip federal courts of jurisdiction to consider most claims (going either to a conviction or to a sentence) in death penalty cases arising from states that supply competent counsel to indigents in state post-conviction proceedings. The jurisdictional prohibition would operate even with respect to claims the state courts failed to address. The only exceptions would be for prisoners who advance claims based on retroactive "new rules" and those who offer newly discovered evidence clearly demonstrating their actual innocence. This is one of the most far-reaching attacks on federal jurisdiction in habeas corpus in recent history.

Under current AEDPA law, a state can trigger a special set of more advantageous (to the state) procedural rules for federal habeas proceedings if the state establishes an effective system for providing competent counsel to indigents in state post-conviction proceedings. Federal courts determine whether a state's scheme for supplying counsel meets the statutory criteria. This is the so-called "opt in" feature of AEDPA. A state *gets* something (advantageous procedural rules in federal court) in exchange for *doing* something (providing good lawyers to indigents in state proceedings). This section would change both ends of that *quid pro quo* equation. First, and most importantly, the state would no longer *need* favorable procedural rules in federal court, because they would get an absolute jurisdictional prohibition on federal court consideration of most federal claims. Second, states would no longer have to satisfy federal courts that their systems for providing counsel in state proceedings are adequate, because the authority to approve state schemes would be transferred to the United States Attorney General. (The Court of Appeals for the District of Columbia would have exclusive jurisdiction to review his or her decisions, but only for an abuse of discretion).

Here too, by placing the authority to decide these matters with the Attorney General—a law enforcement official—the proposed legislation disturbs the existing allocation and separation of powers, and raises another set of potential issues for extended litigation.

Section 10: Clemency and Pardon Decision

This section would strip federal courts of jurisdiction to entertain federal claims arising in clemency and pardon cases. Its extremely broad language would overrule *Ohio Adult Parole Authority v. Woodard* (1998), in which the Supreme Court held in a

case brought under Section 1983 that an inmate was entitled to assert the claim that the clemency procedures of a particular state violate minimal standards of due process under the federal constitution. This provision seems like a gratuitous effort to prevent federal review of established due process rights.

Section 11: Ex Parte Funding Requests

This section would bar federal judges entertaining habeas petitions from handling requests for financial support from attorneys representing petitioners. It would shift that responsibility to other judges. It would also usually require the proceedings on such a request—as well as the amounts allowed—to be public.

Section 14: Application to Pending Cases

This section would make the proposed legislation applicable to already pending federal habeas corpus cases. This section too, like Section 7, would trigger massive litigation over whether the United States Constitution allows Congress to attach legal consequences to events in the past.

The other two sections, 12 and 13, are less controversial. Section 12, "Crime Victims' Rights," merely extends the essentials of the Crime Victims' Rights Act (applicable to federal criminal proceedings) to habeas corpus cases. It would entitle victims to attend habeas hearings and to be notified of "developments" in habeas proceedings. Section 13, "Technical Corrections," merely authorizes district judges to allow prisoners to appeal in habeas corpus cases. It conforms to current practice.

II. Actual Innocence

It has been suggested that this bill preserves access to the federal courts in cases in which state prisoners may actually be innocent. That is not so. This bill would strip

federal courts of jurisdiction to determine a host of federal issues in capital and non-capital cases alike, without any effective safety valve for prisoners who may have been erroneously convicted. The provisions that are supposed to protect actually innocent people come with conditions that scarcely anyone would be able to satisfy. There are numerous examples:

Section 2 would instruct a federal court to dismiss any claim that has not previously been presented to the state courts without giving the prisoner the opportunity to return to state court for further consideration. There are exceptions, but they are extremely limited. As noted earlier, a petitioner who claims actual innocence must demonstrate that: (1) his factual predicate "could not have been previously discovered through the exercise of due diligence;" (2) the underlying facts "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty;" *and* (3) a denial of relief on the basis of the claim would be "contrary to, or would entail an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." Clearly, a genuinely innocent death row inmate could be foreclosed from raising actual innocence for a variety of reasons.

Section 4 would strip a federal court of jurisdiction to entertain a claim the state courts declined to consider on the basis of some procedural error committed by the prisoner or his lawyer in state court. Again, there are exceptions. But they are the same exceptions. So, again, a prisoner who has newly discovered evidence of actual innocence might be turned away from federal court on the ground that the evidence might have been found earlier, that it doesn't clearly and convincingly demonstrate actual innocence to

every reasonable person, or that the claim the state courts refused to consider might be rejected without acting unreasonably.

Section 9 would strip a federal court of jurisdiction to consider *any* claim advanced by a prisoner under sentence of death—if the Attorney General has certified that a state's system for providing counsel to prisoners in state post-conviction proceedings is adequate. Again, only similar narrow exceptions are allowed. A prisoner whose life is at stake would have to prove both that the newly discovered evidence couldn't have been located earlier and that the new facts would clearly and convincingly satisfy any reasonable person that the prisoner is not guilty.

III. Conclusion

In closing, I should emphasize that in these remarks that I have set aside H.R. 3060, the "Terrorist Death Penalty Enhancement Act," because the latter proposed bill is essentially unrelated to the radical surgery proposed in H.R. 3035. Certainly, all important prosecutions of terrorists will proceed through military or federal criminal prosecution, and not in state courts. As a result, the proposed changes in H.R. 3035, which address federal review of *state* cases, do not fall within the ambit of anti-terrorism legislation.

In sum, H.R. 3035 is radical, jurisdiction-stripping legislation that would unnecessarily churn what is gradually becoming well-settled AEDPA jurisprudence. It should be avoided.